

HOUSE BILL NO. 165

INTRODUCED BY G. GUTSCHE, JUNEAU, JAYNE, BIXBY, SMITH, EGGERS,
DOHERTY, GROSFIELD, HALLIGAN, COBB

BY REQUEST OF THE LAW, JUSTICE, AND INDIAN AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE MONTANA REPATRIATION ACT;
PROVIDING A MECHANISM FOR THE RETURN OF HUMAN SKELETAL REMAINS OR FUNERARY OBJECTS
TAKEN FROM BURIAL SITES ~~ON STATE OR PRIVATE LAND~~ PRIOR TO JULY 1, 1991, TO A TRIBAL
GROUP, NEXT OF KIN, OR DESCENDANT ABLE TO ESTABLISH CULTURAL AFFILIATION; EXEMPTING
LITHIC MATERIAL AND OTHER ARTIFACTS OF NONHUMAN DERIVATION REMOVED FROM THE ANZICK
SITE ON OR BEFORE JULY 1, 1991, FROM THE PROVISIONS OF THIS ACT; REQUIRING A HEARING
PURSUANT TO THE MONTANA ADMINISTRATIVE PROCEDURE ACT; PROVIDING FOR AN APPEAL OF
ANY BURIAL PRESERVATION BOARD DECISION TO DISTRICT COURT; STAYING A BOARD DECISION
REGARDING REPATRIATION OR STUDY DURING AN APPEAL; PROVIDING FOR PAYMENT OF TESTING
AND REIMBURSEMENT OF COURT COSTS AND REASONABLE ATTORNEY FEES; PROVIDING
PROCEDURAL RULEMAKING AUTHORITY TO THE BOARD; AND PROVIDING AN IMMEDIATE EFFECTIVE
DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

(Refer to Introduced Bill)

Strike everything after the enacting clause and insert:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 13] may be cited as the "Montana
Repatriation Act".

NEW SECTION. **Section 2. Legislative findings and intent.** (1) The legislature of the state of
Montana finds that:

(a) since July 1, 1991, and passage of the Human Skeletal Remains and Burial Site Protection Act,
Montana law has provided a mechanism to protect marked, unmarked, unrecorded, registered, or
unregistered graves or burial grounds discovered on state and private land from pilferage, disturbance, and



1 destruction in an effort to provide equal protection and respect for all burial sites, human skeletal remains,
2 and funerary objects;

3 (b) despite the state's success in balancing the interests of those persons who have tribal, kinship,
4 cultural, or religious affiliation with a burial site with the interests of scientists, agencies, law enforcement,
5 and private landowners, the 1991 Human Skeletal Remains and Burial Site Protection Act did not provide
6 a mechanism to repatriate culturally affiliated human skeletal remains or funerary objects that were taken
7 from burial sites prior to July 1, 1991;

8 (c) funerary objects interred with culturally affiliated human skeletal remains are not abandoned
9 when interred. Discoverers, therefore, have no right of ownership, and they cannot confer a right of
10 ownership to another because the person who interred funerary objects with the deceased did not through
11 interment abandon a property interest in the objects, but intended for those objects to remain with the
12 deceased.

13 (d) the state of Montana has an obligation to avoid infringing upon the right to religious beliefs and
14 practices guaranteed to all citizens under the free exercise clause of the first amendment of the United
15 States constitution and under Article II, section 4, of the Montana constitution and to preserve the cultural
16 integrity of American Indian citizens recognized by the state under Article X, section 1(2), of the Montana
17 constitution;

18 (e) the state of Montana acknowledges the paramount privacy right of a tribal group, lineal
19 descendant, next of kin, agency, or museum to protect sensitive and sacred information that may be
20 required to be disclosed to demonstrate cultural affiliation or lineal descent and therefore authorizes the
21 protection of that information to the full extent allowed by the Montana constitution; and

22 (f) the state of Montana acknowledges the right of an agency, museum, or person to maintain
23 possession or control of human skeletal remains or funerary objects that are currently under scientific
24 study or that require testing prior to the effective date of the board's determination regarding repatriation.

25 (2) It is the intent of the legislature to:

26 (a) provide a consistent state policy to ensure that all human skeletal remains and all funerary
27 objects interred with those human skeletal remains be treated with dignity and respect;

28 (b) encourage voluntary disclosure and repatriation of culturally affiliated human skeletal remains
29 and funerary objects by an agency, museum, or person;

30 (c) provide a mechanism to provide for repatriation of human skeletal remains and funerary objects

1 to a tribal group, lineal descendant, or next of kin establishing cultural affiliation with those human skeletal
2 remains or funerary objects that were taken from unprotected burial sites prior to July 1, 1991, and that
3 are currently in the possession or control of an agency, museum, or person in this state; and

4 (d) protect the right of privacy guaranteed to tribal groups, lineal descendants, next of kin,
5 agencies, or museums regarding the disclosure of sacred or religious information to the full extent allowed
6 by the Montana constitution.

7

8 NEW SECTION. **Section 3. Definitions.** As used in [sections 1 through 13], the following
9 definitions apply:

10 (1) "Agency" means any department, bureau, commission, board, council, or political subdivision
11 of the state of Montana, except an entity that is a cemetery board or has authority over a cemetery.

12 (2) "Board" means the burial preservation board established in 22-3-804.

13 (3) "Burial site" has the meaning provided in 22-3-803.

14 (4) "Claimant" means a claimant for repatriation under [section 5] and includes a tribal group, lineal
15 descendant, or next of kin.

16 (5) "Control" means having a legal interest in human skeletal remains or funerary objects sufficient
17 to lawfully permit an agency or museum to treat the object as part of its collection for purposes of
18 [sections 1 through 13] whether or not the human skeletal remains or funerary objects are in the physical
19 custody of the agency or museum.

20 (6) "Cultural affiliation" means the existence of a shared group identity that can reasonably be
21 traced historically or anthropologically between a tribal group and an identifiable earlier tribe. It may also
22 include a shared identity that can reasonably be traced historically between an individual and an identifiable
23 individual lineal descendant or next of kin.

24 (7) "Funerary objects" means objects that, as part of a death rite or ceremony, are reasonably
25 believed to have been placed with human skeletal remains at a specific burial site either at the time of
26 death or later and which human skeletal remains are currently in the possession or control of an agency,
27 museum, or person, either along with the human skeletal remains or that can be identified by a
28 preponderance of the evidence to be related to specific known human skeletal remains not currently in the
29 possession or control of the agency, museum, or person.

30 (8) "Human skeletal remains" has the meaning provided in 22-3-803.

1 (9) "Inventory" means an itemized list that summarizes the collection of human skeletal remains
2 and funerary objects in the possession or control of an agency or museum.

3 (10) "Marked, unmarked, unrecorded, registered, or unregistered grave or burial ground" has the
4 meaning provided in 22-3-803.

5 (11) "Museum" means an entity or state or local government agency, including an educational
6 institution, that receives state funding.

7 (12) "Person" includes a corporation, partnership, joint venture, estate, and any other legal entity,
8 as well as a natural person.

9 (13) "Possessing entity" means an agency, museum, or person from whom repatriation is
10 requested.

11 (14) (a) "Possession" means having physical custody of human skeletal remains or funerary
12 objects with a sufficient legal interest to lawfully treat the human skeletal remains or funerary objects as
13 part of a collection.

14 (b) The term does not include human skeletal remains or funerary objects on loan to an agency
15 or museum.

16 (15) "Right of possession" means:

17 (a) possession obtained of nonculturally affiliated human skeletal remains or funerary objects; or

18 (b) possession obtained with the voluntary consent of a group or individual that had authority of
19 alienation over the human skeletal remains or funerary object.

20 (16) "Tribal group" has the meaning provided in 22-3-803.

21

22 **NEW SECTION. Section 4. Agency and museum inventory of human skeletal remains and funerary**

23 **objects.** (1) An agency or museum that on or after [the effective date of this act] has possession or
24 control over human skeletal remains or funerary objects shall within 6 months complete an inventory of
25 all human skeletal remains and funerary objects and, to the extent possible based on all information
26 possessed by the agency or museum:

27 (a) identify the circumstances surrounding the acquisition of the human skeletal remains or
28 funerary objects, including any geographical information available pertaining to the original location of the
29 human skeletal remains or funerary objects;

30 (b) list in the inventory the human skeletal remains or funerary objects that are clearly identifiable

1 as to cultural affiliation; and

2 (c) list the human skeletal remains or funerary objects that are not clearly identifiable as to cultural
3 affiliation.

4 (2) Within 3 months of completing the inventory, the agency or museum shall provide a copy of
5 the inventory to:

6 (a) the board;

7 (b) the state historical preservation office; and

8 (c) each tribal government located in Montana.

9 (3) The agency, museum, board, or state historical preservation office shall provide a copy of an
10 inventory list or a portion of a list to any other requesting party only after the agency, museum, board, or
11 office, pursuant to Article II, section 9, of the Montana constitution, has balanced the public's right to the
12 information and the individual privacy interest associated with the information and has determined that the
13 right of individual privacy does not clearly exceed the merits of public disclosure.

14 (4) Following completion of the initial inventory, each agency or museum shall, whenever the
15 agency or museum receives new human skeletal remains or funerary objects through a loan or donation,
16 update its inventory list within 6 months of the loan or donation. Upon completion, the agency or museum
17 shall provide a copy of this update to the entities listed in subsection (2) within 3 months.

18

19 NEW SECTION. Section 5. Claims for repatriation. (1) A claim for repatriation of human skeletal
20 remains or funerary objects must be made by:

21 (a) filing a written claim for the human skeletal remains or funerary objects with the board and the
22 possessing entity having possession or control of the human skeletal remains or funerary objects; and

23 (b) proving, by a preponderance of the evidence:

24 (i) the claimant's cultural affiliation to the human skeletal remains or funerary objects; and

25 (ii) that the possessing entity does not have the right of possession.

26 (2) A claim for repatriation under this section may be made by a claimant:

27 (a) who claims cultural affiliation and requests the return of human skeletal remains or funerary
28 objects listed in the inventory of an agency or museum; or

29 (b) who requests the repatriation of human skeletal remains or funerary objects that are not listed
30 in the inventory of an agency or museum but are in the possession or control of the possessing entity.

1

2 **NEW SECTION. Section 6. Hearing -- hearings examiner -- evidence -- study or testing order and**
3 **costs -- findings.** (1) The board shall appoint an attorney licensed to practice law in Montana as a hearings
4 examiner to hold a hearing pursuant to Title 2, chapter 4, part 6, on a claim filed under [section 5]. At
5 a hearing under this section, the hearings examiner shall hear the evidence presented by each party,
6 including evidence presented by a possessing entity or intervenor in support of a request for a temporary
7 delay in repatriation made under [section 7].

8 (2) Either party or an intervenor may request and is responsible for the cost of genetic or other
9 study or testing necessary to determine cultural affiliation. Upon such a request, the hearings examiner
10 may order any study or testing necessary and may require a surety bond to ensure protection of human
11 skeletal remains or funerary objects. The hearings examiner may grant the study or testing requested along
12 with sufficient time to conduct the study or testing or may deny any study or testing requested upon a
13 finding that the study or testing would not likely be pertinent to the determination of cultural affiliation.

14 (3) (a) If, based on a preponderance of the evidence, the hearings examiner finds that the claimant
15 has a cultural affiliation with the human skeletal remains or funerary objects and that the possessing entity
16 does not have the right of possession, the hearings examiner shall recommend to the board that the board
17 order repatriation under [section 8]. If the hearings examiner finds that there is a need to temporarily delay
18 repatriation based on an ongoing scientific study or a good faith effort toward scientific study under
19 [section 7], the hearings examiner shall recommend a delay as provided in [section 7].

20 (b) If, based on a preponderance of the evidence, the hearings examiner finds that the claimant
21 has not proven that the claimant has a cultural affiliation with the human skeletal remains or funerary
22 objects and that the possessing entity has the right of possession, the hearings examiner shall recommend
23 to the board that the board deny the claimant's request for repatriation and shall recommend that the
24 board order that the possessing entity be granted uncontested control and possession of the human
25 skeletal remains or funerary objects under [section 8].

26 (c) A recommendation under this subsection (3) shall be made in the form of a proposal for
27 decision as provided in 2-4-621. The provisions of 2-4-621 apply to a recommendation made under this
28 subsection (3).

29 (4) If the hearings examiner recommends repatriation, the hearings examiner shall issue an order
30 requiring the possessing entity to consult with the claimant to arrange for the expeditious repatriation of

1 the culturally affiliated human skeletal remains or funerary objects to the claimant, upon order of the board
2 under [section 8].

3

4 NEW SECTION. **Section 7. Delay of repatriation for scientific study.** (1) If repatriation is ordered
5 after a hearing, a possessing entity may request a temporary delay in repatriation because of:

6 (a) scientific study being conducted on or proposed to be conducted on human skeletal remains
7 or funerary objects in its possession or control; or

8 (b) good faith efforts to initiate or proceed with a scientific study of human skeletal remains or
9 funerary objects in its possession or control.

10 (2) If a hearings examiner determines that a possessing entity has provided evidence supporting
11 a good faith effort regarding scientific study, the hearings examiner shall provide a reasonable period of
12 delay to allow completion of the study prior to repatriation.

13

14 NEW SECTION. **Section 8. Board decision -- order -- immunity against aggrieved parties --**
15 **relinquishment of control by tribal group.** (1) Subject to the provisions of 2-4-621 and 2-4-623, at the
16 conclusion of the hearing and upon receipt of the recommendations of the hearings examiner, the board
17 shall:

18 (a) issue findings of facts and conclusions related to any decision regarding its determination
19 supporting or denying a claimant's written request for the repatriation of human skeletal remains or
20 funerary objects;

21 (b) issue findings of facts and conclusions related to any decision regarding a possessing entity's
22 or intervenor's request for a temporary delay in repatriation pending completion of ongoing scientific study;
23 and

24 (c) provide the claimant, respondent, possessing entity, or intervenor with a written copy of its
25 findings and conclusions regarding the specific repatriation request.

26 (2) A possessing entity that repatriates culturally affiliated human skeletal remains or funerary
27 objects in good faith pursuant to this section is not liable for claims by an aggrieved party or for claims
28 of breach of a fiduciary duty or the public trust or of violation of state law that are inconsistent with
29 [sections 1 through 13].

30 (3) This section does not prevent the governing body of a tribal group from expressly relinquishing

1 control over any human skeletal remains or control or title to any funerary object. The acquisition of a
 2 funerary object from a tribal group or individual with the voluntary consent of the tribal group or individual
 3 with authority to alienate the object constitutes the right of possession over that object. Divestiture of
 4 culturally affiliated human skeletal remains or funerary objects from a person without a right of possession
 5 does not constitute an unconstitutional taking of property.

6

7 **NEW SECTION. Section 9. Appeals -- stay of order pending appeal -- court costs and attorney**
 8 **fees.** (1) Within 30 days of a board decision regarding human skeletal remains or a funerary object
 9 located within the jurisdiction of the state, either party may file an appeal in the district court in the county
 10 in which the subject of the dispute is located. The court may include a grant of attorney fees to the
 11 prevailing party when it would serve the interests of justice. The court shall grant an award of costs to
 12 the prevailing party. An appeal under this section is subject to the provisions of Title 2, chapter 4, part
 13 7.

14 (2) The filing of an appeal by either party automatically stays a board order on repatriation of
 15 human skeletal remains or funerary objects.

16 (3) A protection order issued by the board remains in effect until the issue is finally resolved by
 17 a state court.

18

19 **NEW SECTION. Section 10. Multiple claims -- care and handling of human skeletal remains or**
 20 **funerary objects pending disposition.** If multiple requests for repatriation of human skeletal remains or
 21 funerary objects occur and the appropriate claimant cannot be determined, the board shall provide for the
 22 appropriate care and handling of the human skeletal remains or funerary objects until:

23 (1) the requesting parties agree upon the disposition;

24 (2) the dispute is resolved by the board pursuant to [section 8]; or

25 (3) the issue is finally resolved in a state court of competent jurisdiction.

26

27 **NEW SECTION. Section 11. Closure of hearings.** To the extent allowed by Montana law, the
 28 board shall, upon the request of either party or an intervenor, close any part of a board hearing or any part
 29 of a hearing under [section 6] to the public if the board finds that information required at the hearing may
 30 include identification of the specific location of a burial site that may lead to compromise of a burial site,

1 human skeletal remains, or funerary objects or that information necessary for a determination regarding
2 repatriation may compromise or interfere with any religious practice or custom.

3

4 NEW SECTION. **Section 12. Rules.** The board shall adopt rules necessary to provide for filing of
5 claims, procedures for hearings authorized under [sections 1 through 13], and procedures for resolving
6 multiple claims. Hearings may not occur until rules have been adopted. Rules must address, at a
7 minimum, criteria for determining lineal descent, cultural affiliation, standards of evidence, and standards
8 of proof.

9

10 NEW SECTION. **Section 13. Exclusions.** The provisions of [sections 1 through 13] do not apply
11 to any lithic material or other artifacts of nonhuman derivation removed from the Anzick site (known as
12 Montana historical site No. 24PA506) on or before July 1, 1991, regardless of where the material or
13 artifacts are located or by whom the material or artifacts are controlled or possessed.

14

15 NEW SECTION. **Section 14. Codification instruction.** [Sections 1 through 13] are intended to be
16 codified as a new part in Title 22, chapter 3.

17

18 NEW SECTION. **Section 15. Effective date.** [This act] is effective on passage and approval.

19

- END -